MAYBAN ASSURANCE BHD

v.

CHERN GEOK ENG

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[APPLICATION FOR JUDICIAL REVIEW NO: 1-2001]
22 DECEMBER 2003

LABOUR LAW: *Employment - Constructive dismissal - Test to be applied - Whether conditions satisfied - Whether Industrial Court erred in law and in fact - Whether application to be granted*

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Industrial Court awards - Constructive dismissal - Test to be applied - Whether conditions satisfied - Whether Industrial Court erred in law and in fact - Whether application to be granted*

This was an application by the applicant for an order of *certiorari* to quash: (i) an interim award handed down by the Industrial Court which found that the respondent had been constructively dismissed; and (ii) the final award which held that the applicant had failed to discharge the burden of establishing just cause or excuse for the respondent's constructive dismissal. The respondent, the business development manager at the applicant's branch in Kuching, alleged by way of a letter dated 29 August 1998 that she had been constructively dismissed because the dissolution of her post and her transfer (*via* a letter from the applicant dated 29 June 1998) to the Kuala Lumpur operations division was done in bad faith and contrary to fair labour practice. The Industrial Court found in favour of the respondent and awarded her compensation *in lieu* of reinstatement.

The applicant, in pleading its case, contended that: (a) the Industrial Court had applied the wrong legal test, the 'unreasonable test', instead of the 'contract test'; (b) the Industrial Court had misunderstood the evidence of the human resources manager ('COW1') relating to exh. CLB68 *ie*, COW1's admission that when the applicant's management met and decided to dissolve the respondent's position, the decision was based on exh. CLB68, a document that did not exist at the time of the discussion, which purportedly showed the sales achievements of the Kuching branch but that the document never existed at the time of the discussion; (c) the respondent had delayed in walking away from the job and claiming constructive dismissal; (d) the Industrial Court, in reaching its decision that the respondent had been constructively dismissed, did

not confine its enquiry to the reasons advanced by the respondent in her letter dated 29 August 1998 but had also taken into account irrelevant considerations; (e) the respondent herself did not follow the procedure in the applicant's General Terms and Conditions of Employment of Executives ('GTACEE') when referring her grievance to the company; and (f) since the Industrial Court had reduced by half the compensation payable to the respondent because she was equally to blame for the strained relationship leading to her constructive dismissal, it should have found that there was just cause or excuse for the applicant to dismiss the respondent.

Held (dismissing the application):

[1] Even though the chairman could have used certain words in the course of his award, it was certainly not because that he had found that the applicant had behaved 'unreasonably' towards the respondent that came to his decision on constructive dismissal. Rather, he found that the applicant had not genuinely exercised its management prerogative of transfer *ie*, for the reasons stated in its letter dated 29 June 1998, but had done so to resolve the strained relationship between the respondent and the branch manager ('COW2') arising from grievances which the respondent genuinely held against COW2 – grievances which were referred to the applicant for resolution but which the applicant had not dealt with even-handedly and in accordance with the grievance procedure laid out in GTACEE. It was in so conducting itself that the chairman found that the applicant had breached the implied term of trust and confidence in its contract of employment with the respondent – a term that was so fundamental that any breach of it would amount to a repudiation of the contract since it necessarily went to the root of the contract. (p 909 c-e)

[2] It was very clear that COW1 had admitted that exh. CLB68 did not exist when the management meeting was held. It might well have come into existence at a later date and was prepared to include the 1998/1999 sales figures for comparison purposes but did not, in any way, detract from the fact that CLB68 could not have existed at the date of the management meeting as the letter of transfer was dated 29 June 1998 whereas the sales figures for 1998/1999 related to the period between July 1998 to June 1999. Thus, if the management's decision to dissolve the respondent's position was allegedly based on a non-existent document, there could be no basis for saying that the chairman had misconceived the evidence of COW1 or exh. CLB68 when he held that the applicant's reasons for abolishing the respondent's position at the Kuching branch stood discredited. (pp 910 h & 911 a-b)

[3] After the respondent had received the letter of transfer on 3 July 1998, she had, by 16 July 1998, taken steps to appeal against it. Even after the applicant wrote back to her on 28 July 1998 rejecting her appeal, she did not give up trying to get the transfer order reversed. She had even tried to arrange for a personal appointment with the executive director over the matter, and although her request for the said appointment was tendered one month after receiving the applicant's letter rejecting her appeal, the facts showed that the respondent was of ill health at the material time. Further, during the period between 28 June 1998 and 28 August 1998, the respondent had not done anything to indicate that she was waiving the applicant's breach or that she was affirming the contract – the opposite was the case. In the circumstances, it could not be said that the respondent had delayed in walking away. (pp 913 h & 914 a-c)

[4] The Industrial Court could not be criticised for considering the matters pleaded in the respondent's statement of case, which were really matters already referred to in her letter dated 29 August 1998. There was also no justification to the criticism that the Industrial Court had considered 'stale' allegations made as long ago as a year or more before the respondent's dismissal. It should not be overlooked that the respondent's allegation was that she had been subjected to a series of on-going actions taken against her, the proverbial 'last straw' of which was her transfer. (p 915 a-d)

[5] There was nothing in the GTACEE to say that if the respondent did not comply with the procedure laid down in it, the applicant would be excused from complying with it in dealing with the respondent's grievance. (p 915 f)

[6] The respondent held genuine grievances against COW2 which were not frivolous; hence, although there was nothing seriously wrong or grave in her conduct to justify the applicant dismissing her for just cause and excuse, the Industrial Court was nevertheless entitled to take into account her conduct when considering the appropriate remedy to be accorded to her. Thus, the chairman was not wrong in what he did in regard to the remedy. (p 916 c-d)

Case(s) referred to:

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Pan Global Textiles Sdn Bhd v. Ang Beng Teik [2002] 1 CLJ 181 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Woods v. WM Car Services (Peterborough) Ltd [1981] LRLR 347 ***(refd)***

For the applicant - TM Varughese (Baxter Michael); M/s Ee & Lim
For the respondent - William Ding; M/s William Ding & Co

Reported by Suresh Nathan

JUDGMENT

Clement Skinner J:

This is the hearing of an application for an order of *certiorari* to remove into this court for the purpose of it being quashed Industrial Court Award No. 438 of 2001 dated 29 June 2001 (hereafter 'the Interim Award') and Award No. 746 of 2002 dated 30 August 2002 (hereafter 'the Final Award'), and for other consequential orders.

The parties to this application are Mayban Assurance Berhad (hereafter referred to as 'the applicant') and Chern Geok Eng (hereafter referred to as 'the respondent'). Before setting out the facts a few words need to be said about why the Industrial Court handed down an Interim and a Final Award in this case.

In the Industrial Court the respondent's case had been fought on the basis that she was constructively dismissed without just cause or excuse, while the applicant's case was fought on the basis that (a) there were no legal grounds on which the respondent could consider herself as being constructively dismissed and that the real reason for the respondent claiming to have been so dismissed was her unwillingness to accept an order for her transfer from the claimant's Kuching office to its Kuala Lumpur office in accordance with her contract of service; (b) alternatively, by reason of delay, the respondent had lost her legal right to claim constructive dismissal; and (c) if the court found that the respondent had been so dismissed, the dismissal was with just cause or excuse.

After the reference, the Chairman of the Industrial Court (hereafter 'the Chairman') handed down an Interim Award in which he found in favour of the respondent and held that she had been constructively dismissed. The Chairman's reason for referring to the award as an 'interim' award may be discerned from this passage of the award (at p. 20) where he said:

> Pursuant to a determination that the claimant had been constructively dismissed the next step of the inquiry under a section 20 reference is to decide the question whether the claimant had been dismissed for just cause or excuse ... The Court finds serious difficulty in dealing with such alternative case in the absence of meaningful submissions by both parties on the matter.

The Chairman then directed that the parties attend before him on a date to be fixed by the assistant registrar to make submissions on the point. Consequent to hearing the parties on that particular point, the Chairman handed down his 'final' award in which he held that the applicant had failed to discharge the burden of establishing just cause or excuse for the respondent's constructive dismissal.

The Chairman then went on to consider what remedy to grant to the respondent. He found that it would be wholly inappropriate to order the respondent's reinstatement to her former job as it would cause discord and disharmony to continue in the workplace. The Chairman made an order of compensation instead. In arriving at the proper amount of compensation to be paid to the respondent, the Chairman held that such award should reflect the fact that the respondent had been equally to blame for the strained relationship between her and COW2. Accordingly, the Chairman reduced the amount of compensation by that extent and made the following award:

> The Claimant is awarded the sum of RM70,125 [RM49,500 (4125 x 24 x 0.5) + RM20,625 (4125 x 10 x 0.5)] such sum to be paid within one month from the date of this award.

With that I now turn to the facts giving rise to this application. The respondent was employed by the applicant as an executive on 1 May 1988. She was subsequently promoted to hold various posts within the applicant and rose to the rank of manager of the applicant's Kuching Branch on 14 March 1995. On 1 July 1997 upon the respondent's request and due to her suffering from severe stress the applicant created the position of Marketing Manager, Kuching and the respondent was redesignated to the said position. The respondent relinquished her position as Branch Manager and Mr. Ting Boi Ching (hereafter 'COW2') who was the Regional Manager of the applicant took over that position. On 9 February 1998 the applicant changed the respondent's designation as Marketing Manager to Business Development Manager.

On 29 June 1998, the applicant informed the respondent that her post of Business Development Manager, Kuching Branch was being dissolved. The respondent was also informed that she will be transferred to Kuala Lumpur Operations Division with effect from 16 August 1998 and that her new job designation will be Business Development Manager, Group Commercial. The respondent was informed that her position was being dissolved because:

> This decision was based on the declining trend of production of Kuching Branch for the current and past years and thus no longer feasible to have such position at the branch.

By letter dated 16 July 1998 the respondent appealed against her transfer. By letter dated 28 July 1998 the applicant informed the respondent that the decision to transfer her to Kuala Lumpur 'still stands', but the applicant extended the date of her transfer to 1 September 1998. The applicant reiterated its reasons for dissolving the respondent's position as being:

> The decision is based on the business requirements and the production figures generated by Kuching Branch and in view of the situation, the position of the Business Development Manager is no longer necessary and had to be dissolved.

On or about 28 August 1998 the respondent wrote two letters to the applicant. One was to request for an appointment with the Executive Director and the other to inform the applicant of her inability to report for duty in Kuala Lumpur on 1 September 1998. On 29 August 1998 the respondent wrote a letter to the applicant asserting that she had been constructively dismissed. On 10 September 1998 the applicant replied to the respondent's letter of 29 August 1998 denying her allegations and extended the time for the respondent to report for duty in Kuala Lumpur to 1 October 1998. On 30 September 1998 the respondent wrote back to the applicant saying she had already been constructively dismissed for the reasons given in her letter of 28 August 1998.

The respondent then took advantage of s. 20(1) of the Industrial Relations Act and lodged a complaint with the Director General of Industrial Relations. After attempts at conciliation failed, the respondent's representations were referred by the Minister of Human Resources to the Industrial Court.

A moment ago I mentioned the basis upon which the respondent and the applicant had fought their respective case before the Industrial Court. I will now briefly mention the matters pleaded by the parties in support of their respective case.

In her statement of case the respondent alleged (by para 6) that the sudden dissolution of her position in the Kuching Branch and her transfer to Kuala Lumpur was made in bad faith, without reasonable just cause or excuse and contrary to fair labour practice. She then gave full particulars of her allegations.

The respondent also alleged (in para 7 and 8 of her statement of case) that prior to her transfer, some time between July 1997 and September 1997 she had been subjected to a series of unfair actions or treatment by COW2 as a result of which she wrote to the Human Resources Manager of the applicant, referring her grievances to him. She then gave full particulars of the unfair actions and treatment she received.

As a result of the series of actions taken against her, the respondent pleaded (in para 9) that she was constrained to refer her grievances against COW2 to the Human Resources Manager, in her letter of 4 September 1997. The respondent alleged that instead of resolving her grievance in accordance with the procedure laid down in art. 5 of the applicant's General Terms and Conditions of Employment of Executives (hereafter 'GTACEE'), she was informed a month later by the Human Resources Manager, one Mohd. Rasedi Mat Arof (hereafter COW1) that the management had decided to accept the explanation of COW2 and that her complaints against COW2 'is treated as closed'.

Quite apart from the above complaints, the respondent further alleged (in para 10 of her statement of case) that between October 1997 until August 1998 when she was directed to go on transfer, she continued to be subjected to a series of unfair actions or treatment by COW2 or officers of the applicant. She then gave full particulars of such action and treatment.

By para. 11 of her statement of case the respondent alleged that the applicant's real motive for transferring her from Kuching Branch to the Kuala Lumpur Operations Division was to pressurize her to resign from the company.

The respondent then pleaded (in para 13) that by 'reason of the matters aforesaid' by which she must have meant her subjection to the series of unfair actions and treatment earlier described, as well as the applicant trying to pressurize her into resigning from the company by transferring her to Kuala Lumpur, the applicant 'had evinced an intention no longer to be bound by the terms of the contract of employment and/or has committed a fundamental breach of contract'.

By para. 15 of her statement of case, the respondent alleged that:

> In the circumstances, the claimant is constrained to consider herself as being constructively dismissed without just cause or excuse.

To meet the respondent's case, the applicant in its statement in reply denied that it or its officers had subjected the respondent to any unfair action or treatment. With reference to the respondent's complaint that her grievance against COW2 had not been properly dealt with, the applicant pleaded (in para 7) that all matters brought to the attention of the Human Resources Manager by the respondent was dealt with on its merit by Senior Management as reasonably practical as possible. The applicant also stated in reply (in para 10) that the respondent had no grounds to consider herself as being constructively dismissed or otherwise dismissed without just cause or excuse as claimed, and, alternatively, if the court found that the respondent had been dismissed, the dismissal was for just cause or excuse.

The applicant then proceeded to state its case briefly by pleading that:

(i) 'Transfer' of the respondent within Malaysia is an express term of her contract of service, and is within the discretion of the applicant;

(ii) by letter dated 29 June 1998 the respondent was notified of her transfer to Headquarters as Business Development Manager, Group Commercial, without any change in job grade w.e.f. 16 August 1998.

(iii) the respondent failed and neglected to report for duty in Kuala Lumpur but instead, questioned the applicant's authority to so transfer her and despite the applicant twice extending the date on which she was to report for duty at Kuala Lumpur, the respondent failed to do so, contending instead that she had been constructively dismissed on 29 September 1998.

The applicant then pleaded (in para 13) that the real reason for the respondent's claim to being dismissed was her unwillingness to accept her transfer order to Kuala Lumpur which was made in accordance with her contract of service.

The applicant further pleaded by way of alternative that by reason of delay from 29 June 1998 to 30 September 1998, during which period she continued to be employed by the applicant, the respondent had lost her legal right to claim constructive dismissal.

So much for the pleadings. It will next be necessary to say something about the findings arrived at by the Industrial Court on the issues before it.

On the issue whether the respondent had been constructively dismissed by the applicant without just cause or excuse, the Industrial Court came to the conclusion that she had been so dismissed. This is what the Chairman said (at p. 20 of his Interim Award):

> For the reasons aforesaid the court holds that the Company had constructively dismissed the Claimant. In *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, the Supreme Court held that the common law concept of constructive dismissal comes within the term 'dismissal' in section 20 of the Industrial Relations Act 1967.

With regard to the 'reasons aforesaid' which the Chairman relied upon for saying that the respondent had been constructively dismissed, a reading of the whole of the Interim Award shows that the Chairman accepted that it is a well-established principle in industrial jurisprudence that where there exists either an implied or express right to transfer an employee, the transfer of an employee in the interest or exigencies of the employer's business is a managerial prerogative. However, on the facts before him, the Chairman rejected the applicant's contention that it had exercised its managerial prerogative for the reasons given by it in its letter of transfer of 29 June 1998, namely, that the dissolution or abolition of the position of Business Development Manager held by the respondent and her transfer to Kuala Lumpur was due to a decline in the trend of business in the Kuching Branch. The Chairman rejected the applicant's contention because its evidence regarding this part of its case stood discredited in the eyes of the court. This is what the Chairman said about the matter at p. 9 of his Interim Award:

> On all the evidence before the Court, the Court does not accept the Company's case that the abolition of the position of Business Development Manager held by the Claimant and her transfer to Kuala Lumpur was due to a decline in the trend of business in the Kuching Branch. COW1's evidence to the effect that the management of the Company sat down to discuss the performance of the Kuching Branch pursuant to which the decision to abolish the position of Business Development Manager held by the Claimant was discredited when he admitted that the document (exhibit CLB-68) showing the sales achievements of the said Kuching Branch which was purportedly used as a basis for the said decision never existed at the time of the alleged decision. The Court also seriously doubts that any genuine management solution to the challenge posed by declining sales is the dissolution of the very position that is responsible for generating sales.

Equally important was the finding of the Industrial Court that the real reason for the respondent's transfer was the applicant's desire to remove the respondent from the Kuching Branch due to the strained relationship between COW2 and the respondent arising from grievances which the respondent genuinely held against COW2.

On this aspect of the case, it was the Chairman's finding that instead of dealing with the respondent's grievance in accordance with the procedure contained in GTACEE, which carefully sets out the proper process for resolution of staff grievances, the applicant had acted unfairly and improperly when, in complete disregard to what was stated in the GTACEE, its officer COW1 had not only arrogated to himself the functions assigned to the officer who should have dealt with her grievance, namely, COW2's superior, but had also ignored the other procedures in the GTACEE like meeting with the respondent and keeping joint minutes of any such meeting or meetings. The Chairman stated that instead COW1 had dealt with the grievance himself and had met only with COW2 and had received from him an oral and written explanation which were forwarded to the management for consideration after which the management decided to accept COW2's explanations and to treat the respondent's grievances 'as closed'. In so conducting itself, the Chairman found that the applicant had breached its implied duty to so conduct itself that the relationship of trust and confidence between it and the respondent would not be destroyed or damaged.

With regard to the applicant's alternative plea that if the court found that the respondent was constructively dismissed, such dismissal was for just cause and excuse, the Chairman found (in his Final Award) that the applicant had failed to discharge its burden of establishing just cause or excuse for the respondent's dismissal. The Chairman came to that conclusion for two main reasons:

(a) in attempting to show just cause or excuse for the respondent's dismissal, the applicant had in effect reiterated its earlier argument on the first issue of whether or not the respondent had been constructively dismissed, which, for the reasons already given by him, the Chairman had rejected; and

(b) the applicant had made an attempt to establish that the respondent's refusal to go on transfer was sufficient ground for the applicant to terminate her employment which, on the facts before him, the Chairman was unwilling to accept was the case here, because this was not a case where the respondent had misconducted herself by refusing to report for duty to her new position but it was a case where the employment had come to an end by her acceptance of the proven repudiatory conduct of the applicant.

The applicant now seeks to impugn the award of the Industrial Court on several grounds which I summarise and deal with in turn. Before doing so I bear in mind what counsel for the applicant correctly pointed out regarding the present state of the law which regulates adjudication of industrial disputes in Malaysia, namely, that the decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748, puts an end to the heresy that drew a distinction between errors that went to jurisdiction and

those that did not. The decision of the Court of Appeal was later affirmed by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687. So the position that now obtains is that the Industrial Court has no jurisdiction to make an error of law. If it does so, then the High Court is entitled to intervene in judicial review proceedings. With that I turn to the grounds relied on by the applicant.

The first ground is that in coming to its conclusion that the respondent had been constructively dismissed, the Industrial Court had applied the wrong legal test, in that, instead of applying the 'contract test' the court had applied the 'unreasonable test'.

It is the applicant's case that in order to succeed in a claim for constructive dismissal, a workman must satisfy the following conditions:

(i) there must be a breach of contract by the employer;

(ii) the breach must be sufficiently important to justify the employee resigning;

(iii) the employee must leave in response to the breach and not for any other unconnected reason; and

(iv) he must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

If a workman leaves his employment where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the Industrial Relations Act 1967. Authority for this proposition is to be found in several decisions of our Superior Courts, namely, *Wong Chee Hong v. Cathay Organisaton (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298, *Anwar bin Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197.

I have no difficulty with accepting the applicant's submission on the principles of law to be applied in a case of constructive dismissal. What I have difficulty with is the applicant's application of those principles to the facts of this case. The applicant complains that in his award, the Chairman had 'very frequently' used words such as 'unfairly treated', 'victimised', 'bad faith' and 'unfair actions'. According to the applicant these words point to or describe 'unreasonable conduct' and do not refer to breach of fundamental terms of a contract. For this reason the applicant contends that the Industrial Court had failed to direct its mind to the contract test.

I regret I find no basis for or substance in this contention. In my judgment the applicant has given in to its desire to impugn the Interim Award by deliberately misreading it. I would refer to para. 3.5 of its own written outline submissions (dated 6 December 2001) where it has clearly stated that it was the respondent/claimant who had used these terms or words in the various paragraphs of her pleaded statement of case to describe the conduct of the applicant towards her. It is only to be expected therefore that in considering the case before him the Chairman would make reference to and address the complaints raised by the applicant.

What is more important however, is that a reading of the Interim Award will show that even though the Chairman may have used those words in the course of his award, it is certainly not because he had found that the applicant had behaved 'unreasonably' towards the respondent that he had come to his decision on constructive dismissal. Rather he found that the applicant had not genuinely exercised its management prerogative of transfer ie, for the reasons stated in its letter of 29 June 1998, but had done so to resolve the strained relationship between the respondent and COW2 arising from grievances which the respondent genuinely held against COW2 – grievances which were referred to the applicant for resolution but which the applicant had not dealt with even-handedly and in accordance with the grievance procedure laid out in GTACEE. It was in so conducting itself that the Chairman found that the applicant had breached the implied term of trust and confidence in its contract of employment with the respondent – a term that is so fundamental that any breach of it would amount to a repudiation of the contract since it necessarily goes to the root of the contract.

That the Chairman clearly had the 'contract test' in mind when deciding the issue before him can be seen from reading the 2nd last paragraph of p. 13 to p. 16 of his Interim Award.

It was next said by the applicant that there was no finding in the award that the applicant had committed a breach of a fundamental term which went to the root of its contract with the respondent. I do not agree. The Interim Award must be read as a whole and in a meaningful way. The Chairman had clearly regarded the trust and confidence which an employer and employee repose in each other and which the courts have always regarded as a term to be implied in all contracts of employment, as a fundamental term the breach of which would necessarily go to the root of the contract. That this is so is evident from that part of the Interim Award where the Chairman said (at p. 14):

> The Claimant relies upon the implied term that an employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between an employer and an employee.

The Chairman then referred to the case of *Woods v. W.M. Car Services (Peterborough) Ltd* [1981] LRLR 347 where Browne-Wilkenson J, discussed the relationship of confidence and trust between employer and employee which the courts imply in a contract of employment. The Chairman then said with reference to the *Woods* case (at p. 15):

> In the above case the Court proceeded to hold that 'any breach of the implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract.

A little later (at p. 15) the Chairman then said:

> In the case before the Court, it is the Court's finding that the Company had breached its implied duty of trust and confidence when it failed to give due consideration to the grievances that the Claimant had with her superior COW2 and instead acted arbitrarily to transfer her to its head office in Kuala Lumpur.

In my judgment what the Chairman said above clearly amounted to a finding by him that the applicant had committed a fundamental breach which went to the root of the contract, when it breached its implied duty of trust and confidence towards the respondent.

It was next said that the Industrial Court had misunderstood and misconceived that part of COW1's evidence relating to exh. CLB68, ie, COW1's admission that when the applicant's management met and decided to dissolve the respondent's position, the decision was based on exh. CLB68 which purportedly showed the sales achievements of the Kuching Branch but that that document never existed at the time of the discussion.

The applicant has tried to argue that the Chairman should have realised that while the sales figures for the period July 1998 - June 1999 which are shown in exh. CLB68 may not have existed at the time of the management meeting, they are shown on CLB68 'for comparison only'. I find the applicant's argument difficult to follow. It is very clear to me, as it must have been to the Chairman, that what COW1 was admitting to was that when the management meeting was held, exh. CLB68 did not exist. It might well have come into existence at a later date and was prepared to include the 1998/1999 sales figures for comparison purposes but that does not in any way detract from the fact that CLB68 could not have existed at the date of the management meeting as the letter of transfer was dated 29 June 1998 whereas the sales

figures for 1998/1999 relate to the period July 1998 - June 1999. So, if CLB68 was not in existence at the date of the management meeting, and if, as admitted by COW1, the management decision to dissolve the respondent's position was allegedly based on a non-existent document, there can be no basis for saying that the Chairman has misappreciated or misconceived the evidence of COW1 or exh. CLB68, when he held that the applicant's reasons for abolishing the respondent's position at the Kuching Branch stood discredited.

The next two complaints of the applicant may be taken together as they relate to whether the respondent had delayed in walking away from her job and claiming constructive dismissal. It is the contention of the applicant that it is well settled that one of the four conditions which must be satisfied by an employee claiming to have been constructively dismissed is that he has not unduly delayed in terminating his contract, otherwise he will be deemed to have waived the breach.

The applicant has raised two submissions on the delay point: (a) it complains that a reading of the award will show that the Chairman had not addressed the delay point even though it had been raised in the applicant's pleadings. According to the applicant, if the Chairman did not consider the delay point which constitutes one of the 4 conditions that must be satisfied in constructive dismissal cases, the Industrial Court cannot be said to have applied the 'contract test'; and (b) even if the court found that the applicant had been constructively dismissed, as the applicant had raised the matter in its pleadings the court was obliged to go one step further to consider whether the applicant had delayed in walking away, which the Industrial Court had failed to do. It is the applicant's case that in delaying for about two months in claiming constructive dismissal ie, from 29 June 1998 to 29 August 1998, the respondent had lost her right to treat herself as discharged and must be regarded as having elected to affirm the contract.

I regret I find no merit in the first point taken by the applicant. I have already given my reasons for saying why in my view the Industrial Court had indeed applied the 'contract test' in arriving at its decision on whether the respondent had been constructively dismissed. While it is true that delay is a relevant factor when considering the question of constructive dismissal and if it has not been so considered that may constitute a ground or reason for saying that the decision is flawed or incorrect, it does not necessarily follow that the 'contract test' was not applied or considered by the Industrial Court in arriving at its decision. It is only after the Industrial Court had considered and applied the first three elements in the 'contract test' and come to a finding that there was constructive dismissal in the first place, that the fourth element ie, the question whether

there had been delay to walk away would arise. So it is not quite correct to say that just because the Industrial Court had not entered into the last stage of its enquiry, that it had not applied the 'contract test' – it had, but it had not considered all its elements. The consequence of the Industrial Court not having done so is a matter which I will address when I consider the second point taken by the applicant which I now do.

I must say the second point taken on the delay issue has given me some difficulty. It is true that the applicant raised the delay point in its pleadings and it is also true that the Chairman did not address the point in his Interim Award. The question that arises from his failure to do so is this: Does it follow that I must accede to the applicant's submission that since the Chairman had failed to address a material question in arriving at his conclusion, the Interim Award must be quashed for jurisdictional error of law and the matter remitted back to the Industrial Court?

In my judgment I need not do so. Since the decision of the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, and subject to the cautionary note made therein, which in my view, has no application to the facts of this case, it has been recognised that in exercising supervisory powers in judicial review proceedings, this court has the jurisdiction and power to (i) review the decision of the tribunal on the merits; (ii) substitute the decision of the tribunal with one of its own without remitting the matter to the tribunal for re-adjudication and (iii) order consequential relief.

It will be recalled that that in *R Rama Chandran*, the employment of the appellant there was terminated for the ostensible reason of retrenchment which was brought on by the then prevailing economic recession. The appellant's case, however, was that the retrenchment exercise was really a device to cloak a *mala fide* exercise of power and was tantamount to an act of victimisation. The Industrial Court found that the appellant had been properly retrenched and in doing so refused to consider the issues of *mala fides* and misconduct alleged by the appellant, because the letter of termination had been grounded solely on retrenchment. On application for judicial review of the decision, the High Court refused to intervene. On appeal to the Federal Court, notwithstanding that the Industrial Court had not looked at the allegations of *mala fides* and misconduct, the Federal Court looked at the allegations for itself and found that if the Industrial Court had done so it may have come to a different conclusion. But instead of quashing the decision on that ground and remitting the case back to the Industrial Court for rehearing, the Federal Court decided on the materials before it that the appellant there had in fact been victimised and that the retrenchment exercise was really a device to cloak a *mala fide*

exercise of power. Thereafter the Federal Court went on to decide on the appropriate consequential orders to make by way of compensation. This becomes apparent from reading the judgment of Edgar Joseph Jr. FCJ at p. 186 para E, where his Lordship said:

> A perusal of the judgment of the learned Chief Justice shows that the background upon which we had held that the Employee had been dismissed from service without just cause or excuse was that the act of the Employer in terminating the service of the Employee, simpliciter, by a letter dated 20 April 1988, purported in pursuance of a retrenchment exercise caused by financial and economic losses and economic recession and closure of the 'Debt Recovery and Credit Control Division', to which the Employee was attached, with effect from 1 May 1988, with three months' salary in lieu of notice was really a device to cloak a colourable or *mala fide* exercise of power or, in other words, an act of victimisation, thus avoiding a full enquiry into certain charges of misconduct, as required under the rules of natural justice. Furthermore, we were satisfied that the Award of the Industrial Court was flawed on grounds of *Wednesbury* unreasonableness.
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> In allowing the appeal on the grounds aforesaid, it is self-evident that we had reviewed the Award of the Industrial Court for substance as well as process. First of all 1 would like to examine the legal basis upon which we had done so ... .

In reviewing the decision of the Industrial Court on its merits in this case, it is my view that this court will be entitled to look at all the materials placed before the Industrial Court on the question of delay and ask the question: Would a reasonable tribunal similarly circumstanced have come to a decision that there was delay as alleged by the applicant? In my judgment that question would be answered in the negative for the following reasons.

The question whether, in any particular case, there has been undue delay in walking away from the job is a question of fact that must be decided on the facts as disclosed in each case. I have therefore received no assistance from the cases which counsel for the applicant has referred me to in which the court has on different occasions held that a delay of 14 days, or three weeks, or 1 month 19 days, or 22 days, or 1 and a half months was sufficiently long to defeat the right to claim constructive dismissal, since the question of delay in those cases was decided on the particular facts of each of those cases.

Returning to the facts of this case, they show that soon after the respondent had received the letter of transfer on 3 July 1998, she had by 16 July 1998 taken steps to appeal against it. Even after the applicant wrote back to her on 28 July 1998 rejecting her appeal, she did not give up trying to get the transfer order reversed. She even tried to arrange for a personal appointment with the

Executive Director over the matter. No doubt when she wrote requesting for the appointment it was already 28 August 1998, which is one month after receiving the applicant's letter rejecting her appeal, but it must not be overlooked that the respondent was of ill health at the material time. On 18 August 1998 she had been admitted to the Timberland Medical Centre for surgery after which she was discharged on 21 August 1998, but while recovering she suffered bad septicaemia to her surgical wound which required her to attend for daily treatment from 3 September 1998. This shows that she was not a well person after her operation. Also, during the period between 28 June 1998 and 28 August 1998, the respondent had not done anything to indicate that she was waiving the applicant's breach or that she was affirming the contract — the opposite is the case. In the circumstances I do not think it can be said that the respondent had delayed in walking away.

Counsel for the applicant has said that the respondent continued to remain with the applicant in September 1998 and even collected her salary for September. That may be so but the facts show that for a good part of September the respondent was ill and on medical leave or requiring medical attention. And whilst the applicant may have a claim for a refund of the month's salary paid to her, that does not detract in any way from the fact that by 28 August 1998 she had already claimed constructive dismissal, which she reiterated on 30 September 1998.

I will next deal with the complaint of the applicant that in coming to its decision that the respondent had been constructively dismissed, the Industrial Court should have confined its enquiry to the reasons advanced by the respondent in her letter of 29 August 1998 instead of going into other reasons not relied on by her. It was also said that the Industrial Court had taken into account irrelevant considerations by going into previous acts of alleged unfair conduct and strained relationship with COW2 a year or more before her constructive dismissal.

I must at once say that I find no substance in any of the complaints. In the first place a reading of the whole of the respondent's letter of 29 August 1998 will show that she was: questioning the *bona fides* of her transfer; alleging that her transfer was just part of a series of actions taken by the applicant to make it very difficult for her to continue working for the applicant; alleging that the applicant had records of the various actions taken against her. In her letter of 29 August 1998 the respondent stated that in the circumstances, she had no choice but to consider herself as having been dismissed by the applicant. In the second place, when she came to state her case against the applicant in the Industrial Court the respondent again challenged the *bona fides* of her transfer, pleading fully (including by way of particulars) the series of unfair

actions taken against her. In this regard I do not think the Industrial Court can be criticised for considering the matters pleaded in the respondent's statement of case which were really matters already referred to in her letter of 29 August 1998. Indeed, the Industrial Court would have been wrong not to do so. It will be useful to recall what was said in *R Rama Chandran* on the matter (per Eusoff Chin Chief Justice) at p. 178:

> It is trite law that the parties are bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues ... The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidenced irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.

There is also no justification to the criticism that the Industrial Court had considered 'stale' allegations made as long ago as a year or more before the respondent's dismissal. It should not be overlooked that the allegation of the respondent was that she had been subjected to a series of on-going actions taken against her, the proverbial 'last straw' of which was her transfer.

I will next deal with the applicant's complaint that when the respondent referred her grievance about COW2 to the company, she herself did not follow the procedure laid down in GTACEE, which the Industrial Court chose to ignore. I regret I see nothing in the point taken. The applicant's complaint seems to suggest that just because the respondent did not refer her grievance to the right person in the company's hierarchy, it was excused from complying with GTACEE or was at liberty to act in contravention of GTACEE. The short answer to the applicant's complaint is that two wrongs cannot put right what was wrong because there is nothing in GTACEE to say that if the respondent did not comply with the procedure laid down in it, the applicant was excused from complying with it in dealing with her grievance.

I will next deal with the applicant's complaint against the Final Award. It was said that in coming to its conclusion that the applicant had not made out a case that it had dismissed the respondent for just cause or excuse, the Industrial Court should have considered the judgment of *Pan Global Textiles Sdn Bhd v. Ang Beng Teik* [2002] 1 CLJ 181 where the Federal Court said that where an employee is transferred but wishes to challenge the transfer, the proper way of going about it is to comply with the transfer orders, obey the instructions and then take up any grievance separately, which the respondent had not done in this case.

I regret I find no substance in this complaint. The Chairman did refer to the *Pan Global* case and in fact examined the basis of the decision in that case and then pointed out why what was said in *Pan Global*'s case had no application to the facts of the present case. In my judgment the Chairman was correct in what he said.

It was finally said by the applicant in its submissions that since the Industrial Court had reduced by half the compensation payable to the respondent because she was equally to blame for the strained relationship leading to her constructive dismissal, the court should have found that there was just cause or excuse for the applicant to dismiss her.

I regret I find no merit in this contention. What the Chairman was saying was that whilst the respondent held genuine grievances against COW2 which were not frivolous so that there was nothing seriously wrong or grave in her conduct to justify the applicant dismissing her for just cause and excuse, the court was nevertheless entitled to take into account her conduct when considering the appropriate remedy to be accorded to her. In my judgment the Chairman was not wrong in what he did.

In the result, I would for all the reasons dismiss the application for *certiorari* with costs.